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WILL A LEGITIMATED CHILD SATISFY THE COMMON LAW REQUISITE FOR CURTESY?

The January number of the REGISTER quoted from the *Harvard Law Review* a criticism of the opinion in the case of Bond *v.* Bond, recently decided by the Circuit Court of Pulaski County, and reported in 16 Va. Law Reg. 411.

The *Review*, in taking the ground that the decision is erroneous, quotes Littleton's statement of the requisites for curtesy and argues that birth of issue during the coverture, or of the marriage, is not essential to this estate in those states where legitimating statutes, such as the Virginia statute, exist.

Since the *Review* does not give its idea of what are the common-law reasons for curtesy, it is rather difficult to arrive at the real basis of the conclusions for its criticism; but, from the fact that the case of Hunter *v.* Whitworth, 9 Ala. 965, is cited with approval, it may be surmised that the reasoning of that case is approved.

The grounds of the Alabama case are two: first, that the right to curtesy is based upon the duty of the father to support the child, coupled with the probable feudal origin of the estate; and, second, that the legitimating statute of Alabama wrought a change in the status of the child sufficient to enable the court, "by a kind of legal fiction," to say that he was born in lawful wedlock.

To discuss these grounds in order, it can be safely said that the father's duty of support would seem to have little to do with the estate by the curtesy. Thus, if the child live only for a moment, curtesy is granted; but if the child be taken alive from its mother after her death, even though it should live to maturity, curtesy is denied.

See Minor's Real Property, I, 242, and cases cited. Or, supposing, under the facts of the Alabama case, that the illegitimate shall have arrived at the age of twenty-one, before the marriage or

recognition, the duty of maintenance would not enter into consideration. Indeed, the court recedes somewhat from this position by citing the case of Heath *v.* White, 5 Conn. 236, to the effect that the extent of the husband's interest is not measured by the duty of support, and, as a reason for curtesy, may be put aside as immaterial, to say the least.

It will be noted that the Alabama court does not hold that issue need not be born alive during coverture, *but assumes that this is required,* and in order to get around the requirement, holds that by the legitimation the bastard "is placed in the same situation as if he were born in lawful wedlock. * * * That this much favored estate by the curtesy may be upheld and secured, the husband may, by a kind of legal fiction, *pro re nata,* be presumed to have married previous to the birth of the child." Hunter *v.* Whitworth, therefore, is not authority for the contention that birth of issue during the coverture was not required at common law, but the contrary.

As to whether or not curtesy is of feudal origin the authorities are conflicting, and the reasons for curtesy are difficult to assign. Professor Minor, in his recent work on Real Property, in discussing the requisite of issue, says:

"It is difficult to assign a satisfactory reason for the requirement of the common law that for curtesy issue must be born alive during the coverture. * * * Whatever the reason, the rule itself is rigidly adhered to—so much so indeed that if the wife die in child-birth, and the child is, after her death, by a Caesarean section, ripped from the womb alive, no curtesy is allowed. The fact that the child is *en ventre sa mere* at the time of the wife's death, while reckoned by the law sufficiently in being to enable the child itself to take an estate for its own benefit, will not suffice to confer rights upon third persons. It must actually be born in the period required. * * * It is an interesting inquiry how far, if at all, this rule * * * has been modified by the statutes, existing in many states, which permit the legitimation of bastards by subsequent marriage of the parents. The proper answer depends, in large measure, upon the reasons for the common law rule, which as we have seen, are veiled in obscurity. It has been held in Alabama, however, that the legitimation of a bastard by a subsequent marriage, though no issue be born in wedlock, entitles the husband to curtesy."

Minor Real Property, Vol. I, § 242.

The burden of controversy centers on the effect of the legitimating statutes upon the common law requirements.

The court in the principal case decided that the common law rule required birth of issue during the coverture and that the legitimating statute in Virginia, dealing only with the rights and status of the legitimated child, and not with the property rights of the father, has no effect on that rule. The court does not rely chiefly on the case of Murdock *v.* Murdock, 74 N. H. 77, 65 Atl. 392, but cites this case as analagous.

The New Hampshire case holds that when a childless couple adopt a child and the adopting mother dies, leaving the husband (adopting father), the adopted child and a tract of land, curtesy should be denied. This case is dismissed by the *Review* as not in point, with the observation that the child was not the issue of the adopting parents. The New Hampshire statute regulating adoption contains the following provision, after stating the formal requisites necessary to adoption:

"The child so adopted shall bear the same relation to his adopting parents and their kindred in respect to inheriting property, and all other incidents pertaining to the relation of parent and child, as he would if he were the natural child of such parents, except he shall not take property expressly limited to the heirs of the body or bodies of the adopting parents."

Chapter 181, Pub. Stat. N. H., 1901, § 5.

Now if the adopted child was not the issue of the adopting parents, this statute makes him so insofar as curtesy is concerned. It requires no fiction of law to say that the adopted child by this statute is placed in the position of issue to all intents and purposes, save in the exception noted. Every reason urged by the *Review* in favor of granting curtesy in the principal case can be so urged in the New Hampshire case.

The *Review* apparently emphasises the fact that the requisite of issue is sufficiently complied with if the child can inherit the land as heir to the mother. If this be sufficient, a marriage between the mother and father of a bastard, and the subsequent death of the wife having been during the coverture seised of land, would entitle the husband to curtesy, provided the child could inherit the land as heir of the wife, even though the father never recognized the child as his own. Since 1787 we

have had a statute in Virginia enabling a bastard to inherit on the part of his mother. Va. Code, § 2552. In the illustration given we have a marriage, a child capable of inheriting of the mother, seisin and death of the mother; would the *Review* allow curtesy under such a state of facts? That would seem to be the construction placed by it upon Littleton's definition.

It is stated by the *Review* that the common law required birth of issue of the marriage for the reason that in no other way could the issue be deemed or made legitimate, and the reason, by virtue of a legitimating statute, having ceased to exist, the rule should cease. If this statement should be carried to its logical conclusion, it might with some reason be said that curtesy itself should cease, as there seems to be no accepted reason existing at common law for the existence of curtesy under our present conditions. Or, would there be any reason at common law or under present statutes for denying curtesy to the father of a child taken from its mother's womb after her death, except that *birth during coverture does not occur?* The only sufficient reason would seem to be that the law is so written, and therefore is a reason for itself.

While no decision of the highest court of Virginia compels the decision rendered in the principal case, certainly none forbids it; indeed the Virginia cases defining curtesy cited by the *Review* lean strongly toward the position taken in the principal case.

The case of Breeding *v.* Davis, 77 Va. 639, 646, states:

"When a man takes a wife seised during the coverture of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility inherit it as heir to the wife, has issue by her born alive, and the wife dies, the husband surviving has an estate in the land for his life, which is called an estate by the curtesy."

Carpenter *v.* Garrett, 75 Va. 129, 133, defines curtesy as follows:

"Now four things are requisite for an estate by the curtesy, viz: marriage; actual seisin of the wife; issue born alive; and death of the wife. In the case before us we have three of the essential requisites to an estate by the curtesy. There was a lawful marriage; there was issue of the marriage born alive; and the wife is dead."

The decision of Muse v. Friedenwald, 77 Va. 57, 62, denying curtesy, says, "It does not appear that there was any child born of the marriage."

It would seem that the court in using the language above quoted in these cases had in mind the definition given by Blackstone, in the course of which he says, that "The time when issue was born is immaterial, provided it were during the coverture." II Bl. Co., 127, 128.

It will be noted that in all definitions of curtesy and in all cases dealing with this estate, the first requisite is marriage, and the issue must be, it seems, *of the wife as such*.

In some states bastards are legitimated by the mere acknowledgment of the imputed father, without marriage at all; in such cases all the *reasons* usually assigned for curtesy would exist though the *requisite* of marriage would be absent. There is no difference in the status of the child, no matter how legitimated, whether by marriage, by recognition without marriage, by being born in wedlock, or by adoption, so far as curtesy is concerned, and as regards the duty of the father to support the child. If the presumption is to be indulged, as in the Alabama case, that a child legitimated by subsequent marriage and recognition stands as if born in lawful wedlock, why not indulge the presumption of a lawful wedlock where a mere recognition by the father legitimates the bastard? Or, indulge a like presumption in a case where the child is legitimated by any means whatsoever? If the common law required a birth of issue merely because the issue could not be legitimate unless so born, then the common law for a like reason demanded a valid marriage, and in those states where a valid marriage is not necessary to legitimation, both the requisite of issue born during the coverture and the requisite of marriage would be requisites no longer. Thus, by adding presumption to presumption, all the requisites to this ancient estate could be dispensed with, except seisin of the mother and a child capable of inheriting from the mother.

The Virginia statute law provides that curtesy shall be allowed the husband when the common law requisites therefor exist. Va. Code, § 2286a. This would seem to be an implied disclaimer by the Virginia legislature that it was the intention of the

legitimating statute to change the rule of the common law as to curtesy. Furthermore, it is hardly conceivable that modern legislation, made for the benefit of illegitimate children, could affect the property rights of the father of those children in one way or the other, except in regard to their own property; and would it not be stretching the legal fiction to an unnecessary extent to say that a statute, clearly not dealing with curtesy rights, relaxes the rule or releases any requirement of the common law in regard to this estate?

It is submitted that statutory enactments, unless dealing with curtesy, would have very slight bearing on the common law requisites of this estate. Whether those requisites are reasonable or not would be an interesting inquiry, but a question more in point is, what are they?—to answer which we must look to the common law, and to that alone.

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Pulaski, Va.,
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